

Alabama Sentencing Commission

Minutes of Commission Meeting October 29, 2004

The Alabama Sentencing Commission met in the Mezzanine Classroom of the Judicial Building in Montgomery on Friday, October 29, 2004. Present at the meeting were:

Honorable Joseph Colquitt, Chairman, Retired Circuit Judge, Professor,
University of Alabama School of Law, Tuscaloosa
Honorable Terri Bozeman, District Judge, Lowndes
Honorable Ellen Brooks, District Attorney, 15th Judicial Circuit, Montgomery
Rosa Davis, Chief Assistant Attorney General, Montgomery
Stephen Glassroth, Esquire, The Glassroth Law Firm, P.C., Montgomery
Dr. Lou Harris, D. P. A., Faulkner University, Montgomery
Honorable P. B. McLauchlin, Presiding Circuit Judge, 33rd Judicial Circuit, Ozark
Bill Segrest, Executive Director, Pardons and Paroles, Montgomery

Advisory Council:

Denis Devane, Birmingham
Willia Kate Matthews Richardson, Birmingham

Others Attending:

Miriam Shehane, VOCAL, Montgomery
Kenneth Steely, Attorney General's Office, Montgomery

Staff:

Lynda Flynt, Director
Chris Booth, Staff Attorney
Melisa Morrison, Research Analyst

Judge Colquitt, Commission Chair, called the meeting to order and in his opening remarks introduced Chris Booth as a new staff member. Judge Colquitt introduced Chris to the committee as an attorney who was previously employed The Sentencing Institute who has been working on sentencing issues for some time. Welcoming Chris to the staff, Judge Colquitt noted that the Commission can really use his help in getting ready for the 2005 legislative session.

District Judge Terri Bozeman, Lowndes County, was welcomed as new member of the Sentencing Commission. Judge Bozeman was recently appointment by the President of the District Judges Association as the district judges' representative. On behalf of the Commission and staff, Judge Colquitt welcomed her, noting that it was a pleasure to have her as a Commission member.

The members were advised that there were presently three vacancies on the Commission and that those vacancies are positions which are subject to appointment by the governor. Judge Colquitt stated that although the governor's office is aware of the fact that they are due to make an appointment, right now their attention is probably devoted to matters coming up in the special session.

Addressing new members and visitors who were attending a meeting of the Commission for the first time, Judge Colquitt explained that sometimes the work of the Commission seemed to be quite tedious and involved. Briefly reviewing the beginnings of the Commission, he noted that our reform efforts have been going on for almost five years (since the Commission was established in the summer of 2000, with the Director and staff provided in February 2001), and that there has been a lot of work by many people starting back four chief justices ago.

Judge Colquitt reminded the members and visitors present that the Commission came into being due to the efforts of then-Attorney General Bill Pryor and the strong support of Justice Perry Hooper, who was serving as Chief Justice at that time. He acknowledged that the Commission has had the support of Chief Justice Hooper, Chief Justice Roy Moore, Acting Chief Justice Gorman Houston and Chief Justice Drayton Nabers, Jr., (all the chief justices serving since it was established as a state agency) and now Attorney General Troy King. It was noted that throughout the Commission's existence, the work of the Commission has been successful because of the cooperative efforts of judges, prosecutors, defense attorneys, victims and victims' advocates, the Department of Corrections (through its Commissioner), the Board of Pardons and Paroles (through its Director, Commission member Bill Segrest), and various members of the academic community. Judge Colquitt stated that the Commission and Advisory Council has just about every type of representation imaginable and, as composed, the Commission and Council are very broad based.

Chairman Colquitt stated that although the Commission has been successful with the Legislature in getting a number of bills passed, there were other pieces of legislation that needed passing, some of which the Commission recommended and had introduced during the 2004 Regular Session. Judge Colquitt advised the commission member that they would be reviewing these bills to determine if they should be submitted during the 2005 Regular Session.

One of the major bills, the sentencing standards bill, did not pass last session because some of the Legislators wanted more input from their constituents before granting approval. The Commission staff was asked to go around the state and conduct workshops to explain the details of the standards and provide hands-on experience in completing the proposed worksheets. In compliance with this request, the Sentencing Commission staff and many of the members devoted the last 4-5 months conducting regional workshops throughout the state. Noting that it had been some time since the Commission met and that there was a lot that had been accomplished, Judge Colquitt told the members about the 12 regional workshops that had been conducted over the summer months in Montgomery, Birmingham, Dothan, Huntsville, Mobile and Tuscaloosa.

Judge Colquitt reminded the Commission members that the United States Supreme Court recently heard arguments in *Fan Fan* and *Booker* cases (cases which arose from the states of Wisconsin and Maine, copies of which were made available to the members). Judge Colquitt explained that in one case, decided after the United States ruled in *Blakely v. Washington* that the Federal Guidelines were unconstitutional, the judge refused to apply a guideline enhancement and in the other case the judge did apply the guideline enhancement to the sentence. Judge Colquitt noted that although we believe some of these arguments are not relevant to sentencing in Alabama under our existing laws or the proposed standards, and that they have nothing to do with what we are doing, they do serve as a backstop to let us know what some of the rules in criminal sentencing are that should be considered in proposing changes to our laws. He reminded the members that the Commission's proposed sentencing standards are *not* mandatory or appealable, and that judges do not have to give a reasons for accepting or rejecting them. In addition, there are statutory ranges that remain intact and the proposed standards ranges are within the statutory ranges. These issues distinguish Alabama's standards from those guidelines found unconstitutional in *Blakely*. Alabama may be in the unique position of being one of the few states unaffected by the *Blakely* decision.

Judge Colquitt stated that the legislation the Commission members were being asked to consider today was part of an ongoing process of give and take by a lot of people, agencies and entities over a long a period of time and that, hopefully, it was a very good approach to addressing some issues that we need to address.

Recognizing Kenneth Steely from the Attorney General's Office, Judge Colquitt acknowledged that this was his first time to attend a Sentencing Commission meeting and welcomed him on behalf of the Commission members.

Noting that there were enough members present to make a quorum because the Commission had three vacant positions, the Chair called on Lynda Flynt, the Director of the Commission, to discuss the sentencing standards workshops and pilot projects that had been ongoing.

Sentencing Standards Workshops and Pilots

Lynda stated that the Commission conducted the workshops this summer not only to explain the sentencing standards and worksheets, but to familiarize people of the reform efforts of the Sentencing Commission. She reiterated that the Legislators had specifically requested time to look at the proposed standards and gather input from judges, prosecutors, defense attorneys and others in the criminal justice arena who understood what implementation of the standards would entail.

Although initially disappointed that the sentencing standards did not pass last year, Lynda said that by utilizing the additional time available for education and training, delay in implementation might have been a blessing. Lynda explained that the first day of the workshop was set aside for probation and parole officers, community correction officers,

court clerks, general public, victims, with the second day devoted mostly to judges and prosecutors, defense attorneys and legislators. She noted that there was good turnout at all workshops held in Montgomery, Huntsville, Dothan, Tuscaloosa, Mobile and Birmingham, for a total of 773 attendees.

Appreciation was expressed to everyone who helped with the workshops and shirts with the Sentencing Commission logo were distributed to the Chair of the Education Committee, Dr. Lou Harris, and all who helped as instructors and moderators. She thanked Dr. Lou Harris for all of his assistance in scheduling and planning the six two-day workshops that were held in the months of July through October; Commission members Judge Colquitt, Judge Rains, Judge McLauchlin, Ellen Brooks and Rosa Davis for serving as moderators; and Callie Dietz, Rob Sachar and Tom Monroe of the Alabama Judicial College for their help with scheduling, registration, and other administrative chores. She also thanked Chris Booth, formerly an employee of The Sentencing Institute, for his help in making presentations and performing essential administrative chores. It was announced that Chris is now working for the Alabama Sentencing Commission as a research assistant and community corrections coordinator.

Special thanks were extended to the following commission members for the time they took out of their busy schedules to serve as moderator for the workshops: Judge Colquitt – Tuscaloosa; Judge Rains – Huntsville; Ellen Brooks - Birmingham and Montgomery; Judge McLauchlin -Mobile. Lynda also thanked Becki Goggins of the Criminal Justice Information Center for all of her work in not only drafting the worksheets and most of the powerpoints for use in the workshops, but for acting as an instructor for all of the workshops. Appreciation was also expressed for the help of Commissioner Campbell, Steve Hayes and Bill Segrest in conducting a session of the workshop on the latest developments in their respective departments and fielding questions from the audiences.

Lynda told the Commission members that copies of the complete package that were distributed in the workshops, including powerpoint presentations that were used, were available for the members to pick up. She noted that one of the main objectives in conducting the workshops was to explain that the proposed sentencing standards the Commission developed were nothing like the federal guidelines and that in all the workshops it was emphasized that the standards were voluntary and nonappealable and that by utilizing the standards and worksheets the judges would be able make more informed sentencing decisions.

The topics covered in each of the workshops were reviewed, with Lynda explaining that each workshop started out with the history of the Commission – why and how it was created. The first part of the program was devoted to explaining the Commission's history and legislative charge because it was important that the people of Alabama know the Commission is a separate state agency established under the Alabama Supreme Court, that our goals are statutorily mandated, and the projects we have been working on. She stated that they considered that it was not only important to explain why the Commission was established and the problems in the past that we are trying to resolve, but what we

are doing now and what we have accomplished. In the General Session, they also explained the Commission's long-range plans - where we are going in the future.

Ms. Flynt reported that the Commission staff had received good feedback from the people that attended these meetings and that good recommendations, which were incorporated into the instructions and worksheets, were obtained from each workshop.

Pilots

Lynda reminded the Commission members that there are two sets of standards the Commission was proposing but the standards that have been developed and would be included in the bill presented during the 2005 Regular Session was the first set. These are the historically-based sentencing standards; the truth-in-sentencing standards will be proposed for implementation later after the first standards have been implemented and in use for awhile. Lynda noted that in addition to the educational workshops that allowed judges, prosecutors, defense attorneys, probation and paroles officers to have hands-on experience utilizing actual case examples and completing the worksheets, three sites volunteered to pilot the standards in their courts - Montgomery, Birmingham and DeKalb Counties.

She advised the members that information is still coming into the Commission's office, but we have gotten most of the results from Montgomery and Birmingham. After all of the pilot surveys come in, the Commission will have some idea of how the proposed standards compare to actual sentencing practices in these jurisdictions. Since the standards have not been approved, we have asked all those judges participating in the pilot projects to sentence as they normally would and then complete the worksheets to see how the standards recommendations compare to the sentences they actually imposed.

The Commission was told that the staff would report the results of the pilots after they are all received and compiled. The Commission staff is now waiting for AOC to put the worksheets in electronic format to avoid having to create two separate databases. An added benefit of using the electronic forms is that when one question is answered (blanks filled-in) on the prison in-out worksheet, the same information will automatically be transferred to the prison length worksheet as well.

Q&A from Committee Members:

One member asked if the database would allow someone to search to see if there is an electronic PSI on that case. In response, Rosa and Lynda explained that this would be something possible in the future, not now. Our current goal is to get the forms developed and in an electronic format to enable the staff to compile the results of the pilot sites.

Report from the Sentencing Standards Committee

Commenting on the success of the workshops, Rosa noted that although there were a few negative comments, there were by far more commentaries on the evaluations stating that these recommended standards were the most positive step we have taken in Alabama in years and that they were glad to see Alabama looking at sentencing as a whole concept and in a rational way. She stated that one of the interesting things that happened in the workshops was that many times judges, prosecutors and defense lawyers who initially opposed the standards would change their minds after having the opportunity to see what they were and how they would be used. The workshops helped to dispel many rumors and myths that had been circulating through the criminal justice community. After completing the workshops, very few participants said that they didn't like the standards at all - for the most part the feedback, from the evaluations and from conversations the presenters had with those present, was overwhelmingly positive.

Addressing the Commission, Rosa Davis, Chair of the Standards and Worksheets Committee, reminded the members that a copy of the revised sentencing standards and instructions had been sent out last week. She explained that these were basically the same thing the Commission approved last April, with the incorporation of suggestions that came up through the workshops that were conducted over the summer. The changes proposed were primarily to clarify or correct a few small issues. Rosa proceeded to go through the instructions and worksheets to point out the changes that were made. She reiterated the overall success of this project, stating that these standards and worksheet instructions have now been reviewed and revised by somewhere between 30-50 people. Following the workshops, we have the input of 773 more people into how these really work. In addition, by doing case studies during the workshops, everyone present was given the opportunity to actually use the worksheets and see how they were used to determine the recommended sentence.

After distributing the revised instructions, worksheets and standards, Rosa pointing out to the members that, for the most part, the changes were noted in italics. She then reviewed the following changes to the General Instructions:

- On page 1, the wording was changed to read that the worksheet should be completed *and considered* to comply with the provisions of the Sentencing Reform Act passed in 2003.
- On page 1 after the chart, we added that "a sentencing event" includes all convictions dispose of at the same time, because we are changing from a concept of looking at individual cases to looking instead at a whole sentencing event.
- On page 1, number 3 was added and everything in the general instructions that followed was renumbered. As amended,

- # 3 provides that to comply with the standards, both worksheets must be completed. This is a change the committee agreed upon in concept, without providing the specific language. With this change, even if the decision is non-prison sentence, both worksheets have to be filled out in every case.
- Page 2, # 6, the example was changed from attempted murder to arson I.
- Number 7 on page 2, the example was changed from years to months to be consistent with other examples.
- Page 3, number #9 pertaining to nolo contendere pleas was added to make clear that for worksheet purposes, prior incarcerations included any incarceration, whether sentenced pursuant to a guilty plea or nolo contendere plea and that nolos from other states, although not counted as convictions, would be counted as prior incarcerations or probation revocations when scoring worksheets. In otherwords, nolo contendere pleas can't be counted as convictions, but if resulting in incarceration or probation revocation, they would be counted on the worksheets in the appropriate places.

When asked by Ellen Brooks how this would impact anything that the Commission had done, Rosa responded that in the samples when we looked at prior incarcerations all incarcerations were counted, whether they were nolos or not, if they showed up on the PSIs.

Ellen clarified that she was referring to the fact that nolos would not count as convictions under the instructions. Rosa explained that Commission staff did not run an analysis of a nolo plea as a conviction. Expressing her concern, Ellen noted that by not counting nolos as a conviction she was afraid that we would be moving away from historical sentencing practices. Rosa noted that the Sentencing Standards and Worksheets committee had discussed this issue; however, she thought that it was decided that these should not be counted. She advised that she would recheck the minutes of the committee meetings to be sure.

- Page 3, #11 – Rewritten to make it clear that the worksheets were developed utilizing statistics derived from the specific offenses.
- Page 3, #13 – added language to clarify what compliance with the standards means. *“Compliance with the standards occurs when the sentence conforms with the recommended disposition (prison v. non-prison) and, in cases where prison is recommended, the duration (months) indicated on the sentencing standards tables is imposed. Judges may sentence offenders sentenced to probation for the duration*

listed on the tables or any other lawful term and still be considered in compliance.”

- Page 3, #14 – language was added to expound on the comment that the worksheets do not have to be filled out for offenders who are assigned to drug court or pretrial diversion, to specify that they are to be completed for such offenders when the sentence is imposed. The initial worksheet instructions provided that worksheets were not to be filled out for drug courts or pre trial diversion cases. This change was made because it was realized many cases are actually handled through drug court or pretrial diversion programs and these need to be factored into our data for sentencing consideration. Staff of the Commission determined that the worksheets for these type cases should be completed at the time a defendant is sentenced.
- Page 3, #16 – clarifies what the committee and some committee members thought should be required when a person pleads guilty, i.e., he or she must be informed of the recommended sentencing range under the sentencing standards. Language was added to clarify that.
- Page 4, #17 – the code section for the Habitual Felony Offender Act was added.
- Page 4 #21 was added to provide that if the score falls between two scores listed on the sentence table then you should select the lower score. This change was made based on the advice of our consultants. Also, where there is reference to any sentence of a year and a day, up to any day in that month, it is explained that the sentence should be considered one of 13 months.

Rosa reviewed the following changes on the drug prison in/out worksheet instruction:

- On page 1, #1 dropped language and referred back to the general instructions for clarification.
- Page 1, #3 – added misdemeanors or violations because that is what the statistics were based on.
- Page 1, #4, Prior incarceration of a year or more. We amended the instructions to clarify that we are actually referring to unsuspended prison time imposed, not how long a defendant actually spent in prison.
- Page 1, # 6 – added violation, misdemeanor, felony or prior adjudications, because all these types of prior dispositions were

considered in the statistics used in developing the standards.

- Page 1, #7, Possession of/ use of a deadly weapon. This issue generated much discussion by members of the standards committee. As now written, the instructions more accurately reflects what the committee decided. We had determined that this factor should not be counted if the deadly weapon or dangerous instrument is acquired during the crime and the defendant does not use it or threaten its use in committing the crime or in making his escape after the commission of the crime.

Ellen Brooks commented that the Committee had suggested that the definitions of “deadly weapon” and “dangerous instrument” should be changed to simply refer to the code section, so that if the statute is amended in the future, the amended version would automatically apply. Rosa indicated that this change would be made, in all worksheet instructions.

Changes to the Drug Prison Sentence Length Worksheets

- Number of Additional Felony Convictions (Including Counts) – #2, Because there was a misunderstanding of how to count the number of additional felonies being sentenced at the same sentencing event, the instructions were amended to specifically provide that the scorer should total all offenses being sentenced *other than* the most serious offense being sentenced at the present time. This change was an attempt to clarify that the primary offense or most serious offense should not be included.
- Prior Incarceration with Sentence Imposed of One Year or More. Page 1, #5. Added the language clarifying that sentences with prior prison or jail time only count when the non-suspended incarceration time is one year or more.

Rosa noted that the above changes were made in all instructions and worksheets, whether drug, property or personal, to be consistent throughout. With a unanimous vote of the members present the Commission adopted the voluntary sentencing standards and instructions.

Alabama Sentencing Commission’s 2005 Legislative Package

During the Commission’s October 29th meeting, the members voted to include the following bills in its legislative package for next year. These bills are to be reviewed by the Commission’s Legislative Committee scheduled to meet on November 30, 2004, for changes that should be made before being submitted to the Legislative Reference Service for final edits and their introduction in the 2005 Regular Session.

PROPOSED 2005 LEGISLATIVE PACKAGE

Statewide Access to Juvenile and YO Records by Judges, DAs and Probation/Parole officers.

This bill amends Section 12-15-100 pertaining to Juvenile records and Section 15-19-7 governing Youthful Offender records to specifically provide that judges, prosecutors and probation officers shall have statewide access to Juvenile and YO records for purposes of completing the worksheets required for sentencing standards.

DUI

This bill amends §32-51-191 to expressly provide that any and all prior convictions for driving under the influence of alcohol and/or drugs, whether under Alabama law or under the law of any other state or territory, is to be considered in imposing sentences for convictions under Alabama's DUI statute.

Increased Fines for Felonies, Misdemeanors and Violations

This bill increased the maximum amount of fines authorized to be imposed on anyone sentenced for a felony, misdemeanor or state violation. The bill amends §13A-5-11 and § 13A-5-12 of the Code of Alabama (which has not been amended since 1977) to increase, based on the inflation index, the maximum amount of fines authorized. These fine amounts are the maximum *authorized (not required)* fines, increased from the current amounts as follows:

	Current/1977 Amt.	New Proposed
Class A felony	from \$20,000 to	\$60,000
Class B felony	from \$10,000 to	\$30,000
Class C felony	from \$5,000 to	\$15,000
Class A Misdemeanor	from \$2,000 to	\$6,000
Class B Misdemeanor	from \$1,000 to	\$3,000
Class C misdemeanor	from \$500 to	\$1,500
State Violations	from \$200 to	\$ 600

Increase/Establish Maximum fine amounts for Certain Drug Trafficking Offenses

This bill amends § 13A-12-231, Alabama's Drug Trafficking statute, to authorize assessment of mandatory fines upon conviction of the highest level drug trafficking offense (those in which the largest drug amounts are involved), to be consistent with

the other provisions of the statute. In addition, the bill corrects the fine for possessing more than 4000, but not more than 10,000 pills of hydromorphone to increase the fine amount from \$100,000 to \$250,000.

REFERRED TO COMMITTEE

The following bills were referred to the Legislative Committee for review and recommendations. The Committee is to report their recommendations as to whether or not these bills should be included in the 2005 Legislative package at the next Commission meeting, scheduled for December 3, 2004.

Medical & Geriatric Release

This bill was among those which the Commission was supporting during the last Legislative Session. The Commission members voted to refer this bill to the Legislative Committee for their review and recommendations. A final vote on whether to include this bill in the Commission's legislative package will be made at the next meeting of the Commission.

Supplemental Appropriations for Community Corrections

During the 2004 Regular Session, the Commission supported a bill to provide a supplemental appropriation of \$2.9 million to DOC for Community Corrections. Since Commissioner Campbell was not present during this part of the meeting to discuss DOC's appropriations request for FY 05, this bill was referred to the Legislative Committee for consideration, where the Commissioner could provide input.

Pardon and Parole Facility Fees

This bill increases the amount the Board of Pardons and Paroles can deduct from the wages of residents of their community residential facilities from 25% to 45%, with the additional 20% designated for the payment of court costs, fines, fees, assessments and Victim restitution. This is consistent with the amount now authorized to be deducted in §15-18-180, as amended by Act 2003-353, for defendants assigned to a work release or other residential program operated by a community corrections provider. Of the person's earnings, 25% of the gross wages are to be applied to costs incident to the person's supervision and upkeep, 10% to court costs, fines, court-ordered fees and assessments and, 10% to restitution. After the full 45% is deducted for these expenses the remainder of the wages is to be credited to an account established for the person by the Board and may be paid out for dependent care, savings and spending money.

NOT APPROVED AS THE COMMISSION'S LEGISLATION

Community Corrections Officers Granted Law Enforcement Authority

The Commission members voted not to include this bill in its 2005 Legislative package, but voted to take no position, in opposition of in favor of the proposal to grant statewide arrest powers to community corrections directors and supervising officers. Sentencing Standards.

Bondsman's Process Fees

This bill was introduced on behalf of the Commission last year but did not pass. It amends §15-13-125 of the Code to authorize the assessment of a \$20 fee for the issuance of a bondsman's process and to provide for distribution of the fee to the State-County Community Corrections Partnership Fund established in Section 15-18-186. It was anticipated that very little revenue would be raised and that it could increase the workload of the court clerks.

ADDITIONAL LEGISLATION REQUESTED BE CONSIDERED BY THE LEGISLATIVE COMMITTEE

First Offender Legislation

The Commission staff was requested to review the bill that was drafted last year and other state statutes pertaining to first offenders.

Split Sentence Amendment

Amendment of § 15-18-8, Code of Alabama 1975, to clarify the continuing jurisdiction of the trial court over defendants who have completed their incarceration term and are now serving the probation part of the split sentence following the Court of Criminal Appeals decision in Hollis v. State, 845 So.2d 5. This amendment would ensure that the judge has options on revocation other than simply revoking and incarcerating the parolee for the remainder of the sentence

Commission's 2005 Annual Report

Judge Colquitt reminded the Commission that we were going to have to begin preparing our annual report to present to the Legislature when they convene in February. He suggested that the Commission authorize the staff to go ahead and prepare the report for the Commission to review, as has been the practice in the past. He stated that he considered the drafting of the report to be more of an in-house type activity that the staff could handle, rather than a project in which the Commission had to be directly involved. A motion was made, seconded and approved authorizing the Commission staff to prepare the report.

Update on the Kirby Case

Handouts were distributed to the Commission members, which included copies of the Kirby case and a summary of the 2000 and 2001 amendments to the Habitual Felony Offender statute. Lynda Flynt explained that the handout included 1) a brief recap of the history of Act 2001-977; 2) a copy of the Kirby opinion; 3) the AOC memo that judges and clerks were provided advising them that a request for rehearing had been submitted by the Attorney General 4) DOC and the Sentencing Commission's definitions of violent and non-violent crimes; 5) Issues to be considered for retroactive application of the HFOA amendments; 6) a draft motion for sentence modification and 7) a copy of HB 365 proposing a procedure for implementation of Act 2001-977 which was introduced in the Legislature last year by Representative Demetrius Newton, but did not pass.

Noting that the Sentencing Commission's definition of a violent offense/offender applied to the Sentencing Reform Act and that DOC's definition was developed for other purposes, Lynda told the Commission members that these could be reviewed by the sentencing judges and may be helpful to them in making their determination of whether an inmate is a nonviolent offender. She noted that AOC was sending a memorandum out today advising judges that a Certificate of Judgment had been entered in the Kirby case and I had suggested they might want to mention that these definitions do exist which the judges could consider. Since the Kirby opinion gives the judges unlimited discretion in deciding what violent and nonviolent offender would be, it appears that some type of guidance would be welcomed.

Lynda told the members that she had met with representatives from AOC, DOC, and the Board of Pardons and Paroles on this issue when the Kirby case was first decided and a draft motion, outline of issues that should be considered and a proposed procedure had been drafted. She explained that this material was compiled to provide to the Criminal Rules Committee when it discussed whether or not to recommend adoption of a procedural rule.

It was noted that the major issue in the Kirby case was whether the 2001 Act, making the amendments of the HFOA retroactive, were constitutional. Briefly tracing the history of Act 2001-977, Lynda reminded the members that after the Act was passed by the Legislature and signed by the Governor, Governor Siegleman issued an executive order

staying the implementation of the Act and requiring DOC to draft a procedure for implementation of the retroactive provision. The Executive Order stated that the DOC would send a copy of their proposed procedure to the Attorney General and the Sentencing Commission for their recommendations and input and then it was to be sent back *to the governor for approval*. The members were reminded of the times that the Commission looked over the procedures that were proposed and that we had a lot problems with what was being consider. One of the problems was that the Act only applied to nonviolent offenders, which was not defined and as first submitted, the procedure prepared by DOC did not define the term either. Another real issue was the fact that the Act provided that the 2000 amendments were to be applied retroactively by the sentencing judge or presiding judge “for consideration of early parole of each nonviolent convicted offender based on evaluations performed by the Department of Corrections and approved by the Board of Pardons and Paroles and submitted to the court.” This language appeared to confer parole power on the sentencing court, rather than the Board of Pardons and Paroles. The Act’s provisions spoke in terms of the trial court releasing or granting parole or early release instead of modification of sentence. These were some of the very issues that were at issue in the Kirby case and which the trial court determined were grounds for holding the Act unconstitutional. When the case was appealed to the Court of Criminal Appeals, that Court dismissed it; after which the Supreme Court assumed jurisdiction and had the case transferred.

In the Supreme Court’s *Kirby* opinion, the Court held that the Act was constitutional but did not establish a procedure for obtaining a review of sentences for those inmates that would be eligible. The Court held that the Act granted jurisdiction to the trial court to modify the sentence of any inmate sentenced of life without parole or life under the Habitual Felony Offender Act, provided that they were a fourth offender, if last convicted of a Class A felony had no prior Class A felony convictions and were a nonviolent offender. The Certificate of Judgment was issued in the *Kirby* case last Friday. The rehearing that was filed by the Attorney General requesting rehearing was, therefore, denied last Friday. Lynda explained that we are still unsure what procedure to should be followed in implementing the provisions of the Act. Several issues remain unanswered, such as whether modification is requested by a Rule 32 petition or a motion, whether court costs should be assessed, how should the cases be filed, are denials of requests appealable, etc. These issues appear to be ones that could be appropriately addressed by the Supreme Court under its rule making authority, therefore, it has been placed on the agenda of the Advisory Committee of the Rules of Criminal Procedure, which is scheduled to meet in mid-November.

Three Strikes Laws

The members were advised that Chris Booth had been working on the Three Strikes laws that Mark Dowdy had compiled, making sure that we have all the information that we need, and it is the most current law. This information on the three strikes laws that exist in Alabama and other states will be available soon to anyone who is interested in obtaining a copy. Lynda reminded the members that a draft copy had previously been submitted to members by Mark. Since that time Mark actually called and wrote the DAs

in the different states to verify what we had included for their state. Mark is still waiting for responses from a few states, but this project is basically completed and will be finalized and available in the near future.

New Business -

Community Corrections Survey

Melisa Morrison reported that a community correction survey was conducted by the Commission staff in 2002. In June of this year, a similar survey was sent out to obtain updated data from the community corrections programs around the state. Thus far, the Commission has received surveys from 18 programs. The data has been entered into a database and a booklet summarizing the information received back from the survey has been compiled. She noted that it is still in draft form, but would be finalized by the next Commission meeting. Melisa explained stated that she has taken each question and compared the answers submitted with those received from other programs. She stated this information would be helpful in trying to determine the type of statewide standards that should be developed for these programs.

Data Collection Forms – Simulation Model

Melisa distributed copies of the data collection forms to all members. She explained that this form was used to gather data necessary in developing the sentencing worksheets and standards. These same two forms were sent to community corrections programs and drug court programs who completed a form for each offender. The Commission staff specifically asked those completing the forms to report on the last 50 offenders that have been admitted to their program. We wanted to collect detailed data on those folks. Melisa stated that, thus far, forms have been received back from 12 of the community corrections programs, resulting in a total of 559 offenders that we can study. From the drug court program we received forms from 7 programs for approximately 700 offenders. This data has been entered into the Sentencing Commission's database and staff will no begin analyzing the data obtained on these offenders. Rosa explained that we are trying to get sufficient information to further identify offenders that would be recommended to these types of programs.

Melisa noted that ASC staff is also coordinating with the Administrative Office of Court's IT staff to develop an automated system that can take the information from the worksheets, enter the score into that appropriate block and have the total automatically calculated.

The Commission members were told that John Speir was still working on completing the Commission's simulation model, since there was a delay in obtain one piece of information that needed to be included in the model.

Announcement of Committee Meetings and next Commission meeting

It was determined that the members of the Sentencing Commission's Legislative Committee for FY 05 would be as follows:

Ellen Brooks, District Attorney
15th Judicial Circuit

Donal Campbell, Commissioner
Department of Corrections

Bill Segrest, Executive Director
Board of Pardons and Paroles

Rosa Davis, Chief Assistant Attorney General
and Sentencing Commission staff

Dr. Lou Harris
Faulkner University
Bill Segrest, Executive Director
Board of Pardons and Paroles

Miriam Shehane
Crime Victims' Compensation Commission

Lynda Flynt, Director
Alabama Sentencing Commission

The Legislative Committee members were advised that Commission staff would contact them the next week regarding the scheduling of their next meeting (*the Legislative Committee met on November 30, 2004*). It was announced that the Standards and Worksheet Committee would meet on November 19, 2004

There being no further business, the meeting was adjourned.